STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal From the Court of Appeals
O'Connell P.J., Fitzgerald and Murray, JJ

COUNTY OF WAYNE,

Plaintiff-Appellee,

v.

EDWARD HATHCOCK, *et al*,

Defendants-Appellants.

Supreme Court Nos. 124070-124078

Court of Appeals Nos. 239438, 239563, 240184, 240187, 240189, 240190, 240193, 240194, and 240195

Wayne County Circuit Court
Case Nos. 01-113583-CC, *et al.*

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INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC.'S BRIEF AS *AMICUS CURIAE*

PROOF OF SERVICE

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STATEMENT OF THE BASIS OF JURISDICTION

Defendants-Appellants' statement of jurisdiction is complete and correct.

STATEMENT OF THE QUESTIONS INVOLVED

Amicus Curiae International Council of Shopping Centers, Inc. ("ICSC") submits its brief addressing the following questions:

1. Does Plaintiff Have the Authority, Pursuant to MCL 213.23, to Take Defendants' Properties For the Pinnacle Project, Which Involves Conveyance of the Properties to Private Interests?

   Wayne County Answers: Yes

   Defendants-Appellants Answer: No

   The Trial Court Answered: Yes

   The Court of Appeals Answered: Yes

   Amicus Curiae ICSC Answers: No

2. Can Takings that Are at Least Partly Intended to Result in Later Transfers to Private Entities Be a "Public Purpose," Pursuant to *Poletown Neighborhood Council v City of Detroit*, 410 Mich 616 (1981)?

   Wayne County Answers: Yes

   Defendants-Appellants Answer: No

   The Trial Court answered: Yes

   The Court of Appeals Answered. Yes

   Amicus Curiae ICSC Answers: Yes

3. Should the "Public Purpose" Test Set Forth in *Poletown* Be Overruled Because it Is not Consistent with Const 1963, Art 10, § 2?

   Wayne County Answers: No

   Defendants-Appellants Answer: Yes

   The Trial Court Did not Answer this Question.

   The Court of Appeals Answered: Yes

   Amicus Curiae ICSC Answers: No

4. Should a Decision Overruling *Poletown, supra*, Apply Retroactively or Prospectively Only, Taking into Consideration the Reasoning in *Pohutski v City of Allen Park*, 465 Mich 675 (2002)?

Wayne County Answers: No

Defendants-Appellants Answer: Yes

The Trial Court did not answer this question.

The Court of Appeals did not answer this question.

Amicus Curiae ICSC expresses no opinion on this question.

INTRODUCTION

Amicus Curiae International Council of Shopping Centers, Inc. (hereinafter "ICSC") was founded in 1957 and is the premiere global trade and professional association of the retail real estate industry. Its more than 44,000 members in 77 other countries include shopping center owners, developers, managers, marketing specialists, investors, retailers and brokers, as well as academics and public officials. As a global trade association, ICSC has relationships with 25 national and regional shopping center councils throughout the world. ICSC hosts international trade shows and educational seminars. ICSC has subgroups in the State of Michigan that regularly hosts professional and educational events for its local membership.

The principal aims of ICSC are to advance the development of the shopping center industry and to establish the individual shopping center as a major institution in the community through:

- Promoting the role of shopping centers in the marketing of consumer goods and services.
- Encouraging research into the architecture and design of shopping centers and into the development of improved management and maintenance methods.
- Collecting and disseminating information among members pertaining to techniques of profitable operation, which can serve to improve the individual shopping center and the industry.
- Studying economic, marketing and promotional conditions affecting the shopping center industry.
- Promoting the prestige and standing of members as reputable specialists in the field of shopping center development and management.

Headquartered in New York City, ICSC has over 150 staff members and offices in Washington, D.C., Toronto, London and Singapore.

ICSC has a significant interest in this Court's decisions defining the scope of the use of eminent domain as a valuable tool to provide economic development that alleviates unemployment,

assists commercial enterprises and strengthens and revitalizes local economies, so long as that tool is exercised pursuant to an appropriate statutory delegation of power that includes both the express authority to convey property needed for the project to private interests.

SUMMARY OF ARGUMENTS

ICSC provides the following summary of its arguments based upon the specific questions posed by this Court in its November 17, 2003 Order.

1. *Does plaintiff have the authority, pursuant to MCL 213.23 or otherwise, to take defendants' properties*? While MCL 213.23 delegates the power of eminent domain to public corporations to institute condemnation proceedings, that delegation is not sufficient in this case for this project because the power to convey property needed for this project to a private party has not been delegated. Michigan law has always recognized that ownership of property acquired through condemnation by a private entity is constitutionally valid, so long as a public use exists. However, ownership of property needed for the project by private entities has only been accomplished through legislation that either allows the private entity to acquire the property directly or explicitly authorizes the public agency to transfer the acquired property. The plaintiff had several options available to it to pursue acquisition of property by condemnation that also included an express grant of authority to convey the acquired property. Those acts also create additional responsibilities such as public transparency throughout the entire process and the formation of a definitive plan before the initiation of an action. Plaintiff apparently sought to avoid those requirements by relying upon MCL 212.23 as an enabling act. Because plaintiff has chosen to implement the Pinnacle Project through an act that does not delegate the right to convey property acquired by eminent domain and that is needed for the project itself, plaintiff's action must fail. Because this Court should overrule the lower courts on a statutory basis, it should decline to address constitutional issues.

2. *Are the proposed takings, which are at least partly intended to result in later transfers to private entities, for a "public purpose," pursuant to Poletown Neighborhood Council v City of Detroit, 410 Mich 616 (1981)*? ICSC does not have an opinion as to the particular facts

relating to the merits of the use involved in this action, if this Court determines that MCL 213.23 authorized the takings. However, ICSC reiterates that private ownership of condemned property for the purpose of operating a for-profit enterprise has never foreclosed condemnation pursuant to a properly drafted statute passed by the legislature, where a public use exists. Therefore, assuming *arguendo* that a public use exists and plaintiff has implemented the takings through a proper enabling act, the proposed transfers to private entities does not eliminate the public use.

3. *Is the "public purpose" test set forth in Poletown, supra, consistent with Const 1963, art 10, § 2, and, if not, should this test be overruled*? Irrespective of the *Poletown* holding that public use and public purpose had been used interchangeably, the *Poletown* "public purpose" test is consistent with Const 1963, art 10, § 2, and public use doctrine as expressed in opinions issued by this Court prior to *Poletown.* The cases prior to *Poletown* demonstrate that this Court has applied public use in a flexible manner, recognized that public use does not require construction of a facility open to the public and determined that construction of facilities by private, for-profit entities that were not accessible to the public but that yielded a general benefit to the general public constituted a public use. Therefore, *Poletown,* should not be overruled if the Court is compelled to reach that constitutional question.

4. *Should a decision overruling Poletown apply retroactively or prospectively only, taking into consideration the reasoning in Pohutski v City of Allen Park, 465 Mich 675 (2002)*? ICSC expresses no opinion on this issue.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The material facts and proceedings in this case have been set forth by the Court of Appeals in *County of Wayne v Hathcock*, 2003 Mich App LEXIS 1042 (2003) and are herein adopted by reference.

LEGAL ARGUMENT

I. THE ULTIMATE OWNERSHIP OF CONDEMNED PROPERTY IS NOT DISPOSITIVE, SO LONG AS A PUBLIC USE EXISTS.

The Michigan Constitution provides:

> Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

Const 1963, art 10, § 2. ("Article 10, § 2"). Strict grammarians will quickly note that this provision lacks a basic piece of sentence structure: an actor. Article 10, § 2 does not provide that "[t]he public shall not take private property for public use...." Rather, Article 10, § 2 is intentionally vague. The lack of definition of the actor taking property contained in Article 10, § 2 cannot be unintentional because private corporations such as railroads, bridge companies and utilities have been taking other private property to use as part of their for-profit business activities for over 150 years. In fact, the equivalent provision of the 1908 Michigan Constitution expressly recognized a private corporation's right to exercise eminent domain:

> Private property shall not be taken by the public **nor by any corporation** for public use, without the necessity therefore being first determined and just compensation therefore first being made or secured in such manner as shall be prescribed by law.

Const 1908, art 13, § 1.(Emphasis supplied)

Clearly, given the lack of specification in Article 10, § 2, as to the actor that may exercise the power of eminent domain and the historic recognition in both statutes and decisions of the appellate courts that private property may be directly acquired, owned and used for profit by a private entity, Article 10, § 2 cannot be limited to public acquisition of property through condemnation. In fact, the Uniform Condemnation Procedures Act, MCLA 213.51, *et. seq.* ("UCPA") provides the procedural basis for acquisition of property by both public and private

agencies. The Preamble to the UCPA states that it is "[a]n act to provide procedures for the condemnation, acquisition or exercise of eminent domain of real or personal property by public agencies or private agencies. . . ." MCLA 213.51(h) defines a "[p]rivate agency" as "a person, partnership, association, corporation, or entity, other than a public agency, authorized by law to condemn property." MCLA 213.51(j) defines a "[p]ublic agency" as "governmental unit, officer or subdivision authorized by law to condemn property." Throughout the UCPA, the condemning authority is referred to as the "agency" which is defined by MCLA 213.51 as "a public agency or private agency." Therefore, the UCPA expressly recognizes the authority of private agencies to directly condemn property.

Given the adoption of language in Article 10, § 2 that fails to limit the exercise of eminent domain to public agencies, the context in which Article 10, § 2 was adopted including the express recognition in the 1908 Constitution that property could be condemned by private entities, the historical recognition of that right by this Court and the unchallenged confirmation of that right in the UCPA, the proper issue before this Court is not who acquires the property, who ultimately owns the property or whether the ultimate owner of the property earns profit though that ownership. The only constitutional issue presented to this Court is found in the text of Article 10, § 2. The issue is, simply put, whether the taking is for public use. The fact that the property is ultimately owned by a private entity does not mean that the use is not a public one.

II. THIS COURT'S PRIOR HOLDINGS EVALUATING PUBLIC USE IN EMINENT DOMAIN CASES SUPPORT THE HOLDING IN *POLETOWN*, IRRESPECTIVE OF WHETHER THE TERM "PUBLIC PURPOSE" HAS BEEN USED INTERCHANGEABLE WITH THE TERM "PUBLIC USE."

Poletown Neighborhood Council v City of Detroit, 410 Mich 616 (1981) held that the "the terms [public use and public purpose] have been used interchangeably in Michigan statutes and

decisions in an effort to describe the protean concept of public benefit." *Id.* at 630. In the next sentence, the majority of this Court states that the "term 'public use' has not received a narrow or inelastic definition by the Court in prior cases." *Id.* The majority's holding that public use and public purpose were synonymous has been a point of significant criticism starting with the dissents in *Poletown* and continuing with Judge Murray's opinion in the case at bar. The critics of the *Poletown* majority have asserted that public purpose and public use have always been distinct legal concepts and that *Poletown* eliminated that distinction without basis.

Even assuming *arguendo* that public purpose and public use were distinct legal concepts prior to *Poletown*, a close analysis of the public use cases preceding *Poletown* demonstrate that the majority's assertion that "'public use' has not received a narrow or inelastic definition" is true. Therefore, *Poletown* was not an "extraordinary case" that suddenly departed from past precedent and "seriously jeopardized the security of all private property ownership," as asserted by Justice Ryan in his dissent. *Id.* at 646 (Ryan, J., *dissenting*). This Court's prior decisions demonstrate that the majority holding was fully supported by prior public use (irrespective of the public purpose) case law. Therefore, the precedents that defined public purpose and were cited in the majority opinion in *Poletown* were not necessary support for that holding. As such, *Poletown* should not be overruled.

a. Public Use Cases Decided Before *Poletown* Were Flexible and Recognized a Wide Variety of Potential Public Uses.

According to Defendants-Appellants' Brief on Appeal:

> As early as 1871, Justice Cooley observed that a "public use" only existed "where the government is supplying its own needs or is furnishing facilities for its citizens in regard to those matter of public necessity, convenience or welfare." Thomas Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union, 533 (2d ed 1871). In other words, Cooley identified a "public use" as one in which the government takes

> property to supply "its own needs" or one in which the government takes property to furnish "facilities for its citizens." This common understanding coincides with the traditional use of eminent domain for government office buildings or for public facilities for its citizens, such as schools or parks. It does not coincide with a use by private entities that is neither to be open to the public nor owned by it.

Defendants-Appeallants Brief at 40. Furthermore, Defendants claim that the "word 'use' also incorporated limits because it implied that the property must be used by the public. In other words, the 'public use requirement traditionally meant that the property had actually to be used by the public." Id, at 40-41, *quoting* Cass R. Sunstein, Lochner's Legacy, 87 Colum L R 873, 891 (1985). Defendants also assert that "the constitutional limiting phrase 'public use' has consistently been read as embodying a requirement that private property be taken only for a 'public use,' that is, a 'use' from which the general public cannot be excluded" and "even where the line to distinguish between a public and private use was extended to permit taking property for railroads or common carriers or utilities, it was done with stringent requirements that the public be entitled to use the railroad, highway or utility." Defendants-Appellants Brief at 42.

As will be demonstrated by a review of the historical public use opinions issued by this Court prior to *Poletown*, all of these statements are untrue. Prior to *Poletown*, public use was not limited to facilities open to the public. Public use included facilities that were often acquired through eminent domain directly by private agencies, were not open to the public, and provided general benefits to the public as a whole by providing specific benefits to readily identifiable private parties. Public use also included a public agency acting to remove a deleterious condition.

In *Swan v Williams*, 2 Mich 427 (1852), the "most important question presented" was "the constitutionality of the act of incorporation" of a railroad company, which "authorizes the appropriation of private property for the purposes contemplated in the Act, without the consent of the owner." *Id.* at 429. This Court upheld the statute and rejected an argument that the "property is

not taken for public use . . . [b]ecause the property when taken is not used by the public, but by the corporators, for their own profit and advantage." *Id.* at 429-430. This Court made several key points in *Swan*.

The Court recognized that a corporation may profit by providing a public use. It "is unquestionably true that these enterprises may be, and probably always are, undertaken with a view to private emolument on the part of the corporators, but is nonetheless true that the object of the government in creating them as a public utility, and that private benefit, instead of the being the occasion of the grant, is but the reward springing from the service." *Id.* at 436.

This Court rejected the idea that a public use involved provision of a facility to the public (like a tollroad or canal) as opposed to a facility that could only be accessed by the public through the provision of a service by the corporation (like a railroad).

> It is true, also, that the mode of conveyance and of travel is different upon this road from that upon turnpikes and common highways, but this difference springs from the character and construction of the road, and the vehicles employed, and not in the use designed. The one is equally intended, however, to open good and easy communications, with the other; and so far as travel and the transportation of property is concerned, the public have the same rights in the one case as in the other, with this difference, that the means employed are varied with the mode of travel.

Id. at 437. This point may seem self-evident and like a foregone conclusion after 150 years of railroad condemnations. However, it demonstrates that this Court did view public use as a flexible doctrine when deciding *Swan*.

Ryerson v Brown, 35 Mich 333 (1876), evaluated the constitutionality of an act authorizing private mill operators to utilize eminent domain to obtain property necessary for construction of mills that provided water power. *Id.* Two important issues must be noted when reviewing *Ryerson.*

First, this Court essentially substituted its factual opinion about the need to construct power-generating mills for that of the legislature.

> In this state it is doubtful if such legislation [authorizing eminent domain for the construction of mills] would add at all to the aggregate of property. Numerous fine mill-sites in the populous counties of the states still remain unimproved, not because of any difficulty in obtaining the necessary permission to flow, but because the power is not in demand. If the power were needed, the land would generally be obtained on reasonable terms, except, perhaps, where there was ground to believe a dam would become a nuisance. . .

Id. at 337 – 338. Similarly, in his concurring opinion Justice Campbell opined that the

> increase of settlements and the improvements in machinery are constantly diminishing the old difficulties instead of increasing them. The choice between steam and water power is now one purely of private economy. The public can be supplied adequately at all events, and the occasional refuse of individuals to sell the right of flowage cannot drive any community into distress.[1]

Id. at 346. Neither opinion provides any factual support for these assertions.

Ryerson blends a concept of necessity into public use different than the notion that the full extent of the taking must be necessary to implement the project.

> If, however, the use to which the property is to be devoted were one which would justify an exercise of the power, it would still be imperative that a necessity should exist for its exercise. All the authorities require that there should be a necessity for the appropriation in order to supply some public want, or to advance some public policy; the object to be accomplished must be one which otherwise is impracticable.

Id. at 339. Clearly, the Court's determination that eminent domain was not a public use for water mills was based in large part upon their belief that sites could be obtained easily without using eminent domain and therefore the public use was not necessary (as opposed to whether the acquisition of a particular parcel of property was necessary for the project). However, if the justices

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1 The Court's views appear to have changed from the opinion of the Court that issued *Swan.* In *Swan,* the Court made a passing reference to the acceptability of the use of eminent domain for the construction of mills. "In fact, the whole policy of this country relative to roads, **mills**, bridges and canals, rests upon this single power, under which lands have always been condemned; and without the exertion of this power, not one of the improvements just mentioned, could be constructed." *Swan*, *supra* at 432 (emphasis added). In addition, in 1824 a territorial law had been passed that authorized condemnation for mill purposes but it appears that the statute was little-used. *See Ryerson*, *supra* at 335-336.

felt that the public use of providing mills was a necessary service that the public could not obtain, they may have held that it was a public use. Contrast this to *Poletown*, where the dissent of Justice Fitzgerald refers to the fact that the *Poletown* site was the only 450 to 500 acre rectangular site with access to a long-haul railroad line and freeways. *See Poletown*, *supra* at 337 (Fitzgerald, J., *dissenting*). Quite simply, no other case involved this Court substituting its factual belief for that of the legislature as to whether a public use was necessary, where the Court apparently believed that the public use itself might be constitutional if general conditions were different[2].

Second, the statute at issue allowed any private person to exercise the right of eminent domain to construct a mill without any requirement that the private person obtain approval of his plans from a public agency or that the private person promise to make his services available to the general public. "The statute appears to have been drawn with studious care to avoid any requirement the person availing himself of its provision shall consult with any interest except his own." *Ryerson*, *supra* at 339.[3] The decision reviews cases from other jurisdiction, which, for the most part, upheld similar statutes and placed emphasis on the fact that in some instances public use was defeated "where the mills were not compelled by law to render service for the public under impartial regulations." *Id.* at 337.

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2 "If the act were limited in its scope to manufactures which are of local necessity, as grist-mills are in a new country not yet penetrated by railroads, the question would be somewhat different from what it is now." *Ryerson*, *supra* at 338.

3 As stated by Justice Campbell in his concurrence in *Ryerson*:

> Assuming that there are cases in which water-power manufactories may be put under obligations of such a general character as in one sense to be of a somewhat public nature, this statute has not undertaken to declare what uses are thus to be regarded, and has left it to the mill-owner to assert, and to the commissioners to find, any use to be public which they choose to regard as such.... The legislature must indicate what sort of possible public purposes they are willing to have submitted to the process of an involuntary taking. Whether the particular improvement is so necessary as to justify the condemnation of lands is then a question for the appraising body.

Id. at 343-343 (Campbell, J., *concurring*).

From today's perspective, the operation of the mills at issue in *Ryerson* involves quaint technology and a purely private business. However, the decision's factual discussion about the services provided by mills demonstrates that by providing power, mills were the oil transmission pipelines, underground gasoline storage facilities and electrical lines of their day. As such, *Ryerson* has been rejected by decisions applying public use concepts to twentieth century power-generating technologies. The substitution of the justices' views about the need for mills over that of the legislature based upon an unknown factual record represents unwise and abandoned precedent. Finally, the legitimate concerns expressed by the justices about a statute that allowed any person to exercise the power of eminent domain over any other person without obtaining approval from any executive or administrative body and without promising to make the resultant services available to the public in any fashion did not exist in *Poletown*, where a public agency implemented the condemnation after determining that a public use existed in accord with a complex statutory procedure.

Kinnie v Bare, 68 Mich 625, 626 (1888) addressed a condemnation proceeding instituted "for the purpose of laying out and establishing a drain." *Kinnie* is important because it recognizes that eminent domain could be used to alleviate a deleterious condition in the community and does not mention any requirement that public use requires construction of a facility open to the public.

> Drain laws which take from the citizen his private property against his will, can be upheld solely upon the ground that such drains are necessary for the public health.... [To eliminate] low, wet, and marshy lands [that] generate malaria, causing sickness and danger to the health and life of the people.

Id. at 673. There is no indication that the general public could access the drain, which would clearly benefit the few property owners directly adjacent to it.

Board of Health v Van Hoesen, 87 Mich 533, 542 (1891) held that a statute authorizing a private company to use eminent domain to acquire land for cemetery purposes was unconstitutional. According to *Van Hoesen*:

> To justify the condemnation of lands for a private corporation, not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use.... It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use. In other words, a use is private so long as the land is to remain under private ownership and control, and no right to its use, or to direct its management, is conferred upon the public.

Id. at 539 (internal citations omitted). The statute at issue in *Van Hoesen* did not even require the land acquired for cemetery purposes to be made available to the public or even used for cemetery purposes.

> The lands owned by it are under the absolute control and dominion of the corporation. It may sell to A., and refuse to sell to B., and by its sale to A. it excludes every other person from that parcel. Not only may it sell to A. for burial purposes' but it may sell to any other person for any purpose, if, in its judgment, the lands are not occupied or required for burial purposes.

Id. at 541. As such, presumably every panel of this Court in every time frame would have ruled that the enabling act was clearly deficient because it did not require the establishment and implementation of a public use by the condemnor.

The strict holding of *Van Hoesen* is that the statute at issue did not contain any requirements that the acquired property be made available in a manner that conveyed any benefit to the public or even be used for the purposes defined by the statute. The concepts described by the Court in justifying its holding are clearly at odds with *Poletown*. If *Van Hoesen* had been the only judicial pronouncement on public use before *Poletown*, the argument that *Poletown* reflected a sudden and radical expansion of public use would have merit. However, the *Van Hoesen* language is also

clearly at odds with numerous other cases decided by this Court, as will be discussed in more detail, *infra*.

If eminent domain was limited to facilities open to the public such as toll roads or canals or facilities accompanied by necessary appurtenant services such as railroads, then public use would not include a drainage ditch as discussed in *Kinnie*, utility services such as the pipe line approved 63 years later in *Lakehead Pipe Line Company, Inc. v Dehn*, 340 Mich 25 (1954) (upholding constitutionality of statute allowing condemnation to construct pipe line carrying oil) or construction of private housing facilities and blight removal as was approved by this Court in *In re Brewster Street Housing Site*, 291 Mich 313 (1939) and *In re Jefferies Housing Project*, 306 Mich 638, 644 (1943). Only adjacent private landowners have the ability to use a drainage easement, however, a public use exists because the community as a whole is benefited by the elimination of malaria or other disease-inducing conditions. In the case of blight removal, (assuming *arguendo* that this was the sole public use that justified the use of eminent domain), no facility remains for use by the public. Furthermore, the public has less access to private homes and apartments constructed as part of a low-income housing project than facilities that are open to the public to conduct business, such as a shopping center. A member of the public cannot pay a toll and access an oil transmission pipeline, but the community as a whole benefits from utility services that encourage business and employment. Clearly, the drainage easement case, the modern utility cases and the blight removal cases represent an acknowledgment that public use entails facilities that literally fuel commerce (such as utilities), activities that provide general benefits to the community by removing deleterious conditions and activities that result in the construction of private facilities that would otherwise not be constructed and that benefit the community as a whole.

Berrien Springs Water-Power, Co. v Berrien Circuit Judge, 133 Mich 48, 49 (1903) held that a statute authorizing the use of eminent domain by a private party for the dual purpose of improving navigation and creating power was unconstitutional. *Berrien* defers to *Ryerson* and reaffirms that creating a water power is not a public use.

> Relator is, then, by these proceedings, seeking to condemn land which will be overflowed as a result of its damming St. Joseph river, a navigable waterway. Relator's project is to make the stream navigable -- or, to be more accurate, to improve its navigability -- for the double purpose of carrying on a transportation business and to obtain a water power. This water power relator will own, lease, use, and control for the purposes heretofore indicated in the law and in its articles of incorporation. While some of these purposes may be public, it is clear that many of them are private. See *Ryerson* v *Brown,* 35 Mich 333 (24 Am. Rep. 564).

Berrien, *supra* at 51-52. However, the equivalent holding as it relates to modern technologies has been rejected, *see Lakehead, supra*, which will be discussed in further detail *infra.*

Berrien recognized that condemnations did not fail as a public use because they incidentally benefited private parties.

> It may easily happen -- indeed, it is quite probable -- that the appurtenant water power may require a higher dam, and, consequently, a taking of more property, than is demanded by the transportation business to be carried on, or by any other public necessity for said navigable waterway. If the fact that the taking results in improving the navigability of a stream proves said taking to be a public necessity, the statute is constitutional, notwithstanding the fact that one of the purposes of improving the navigability of the stream is to obtain a water power; for land can be taken, under the power of eminent domain, for a legitimate public purpose, even though a private purpose will be thereby incidentally subserved.

Id. at 54 (internal citations omitted). However, *Berrien* determined that the enabling statute had not been drafted narrowly enough to limit acquisitions just to that property required to facilitate navigation as opposed to property required for both navigation and additional property required for power plant purposes. "The taking is not limited to what is required by the public necessities in the improvement of the navigability of the stream, and the law contains no provision by which the

taking can be limited to such public necessities." *Id.* at 53. Because the scope of the taking was not limited to the public use, that particular statute was invalid.

Detroit International Bridge Co., v American Seed Co, 249 Mich 289 (1930) approved a statute authorizing the use of eminent domain by a private corporation to obtain approaches for what is now presumably the Ambassador Bridge. *Detroit Bridge* is unremarkable in that it applies the same principles that had been previously approved in railroad cases. The only notable point in *Detroit Bridge* is the approval by the Court of the State deferring its right to regulate tolls to the federal government, demonstrating that the State need not maintain a formal procedure to regulate the public's access to the facility. *Id.* at 299-300.

In *In re Brewster, supra,* this Court addressed public use in the context of both slum clearance and creation of public housing and concluded, after reviewing precedents from other states that "[w]ithout dissent . . . the courts have reached the conclusion that slum clearance was a public purpose and **that housing authorities serve a public use**." 291 Mich at 337 (emphasis added). As such, this Court deemed Act No. 18, Pub. Acts 1933 (Ex. Sess.) constitutional. This act had several noteworthy provisions. First, the purpose of the act authorized the city "'to purchase, **acquire, construct, maintain, operate, improve, extend, and/or repair housing facilities** and to eliminate housing conditions which are detrimental to the public peace, health, safety, morals, and/or welfare.'" *In re Brewster, supra* at 324, *quoting* Section 2, Act No. 18, Pub. Acts 1933 (Ex. Sess.) (emphasis added). Operating a public housing facility was, at worst, equal to slum clearance as a defined public use contained in the statute (and both public uses were certainly intertwined). Section 7 provided that the commission (as established pursuant to Section 2) could "purchase, lease, **sell, exchange, transfer, assign** and mortgage any property, real or personal, or any interest therein... or acquire the same... under the power of eminent domain...." *In re Brewster, supra,*

quoting Section 7, Act No. 18, Pub. Acts 1933 (Ex. Sess.) (emphasis added). Therefore, the statute always contemplated the potential sale of the property and developers were not precluded as the potential buyers of the property by the terms of the act. Finally, the public use was justified in part because "[t]he existence of such [slum] districts **depresses the taxable value of neighboring property and deprives the State of revenue.**" *In re Brewster*, *supra* at 337 (emphasis added). Therefore, general financial benefits to the city and the community as a whole similar to those described in *Poletown* contributed to the finding that a public use existed.

In *In re Jefferies, supra*, the City of Detroit "sought to condemn 581 parcels of property in which approximately 2,500 residents were interested" to construct alternative low cost housing. *See* 306 Mich at 644. The Court reaffirmed a prior holding that recognized that both clearing of slums and the creation of housing that would be leased were valid, independent public uses.

> Appellants claim that the taking of private property by eminent domain in the absence of slum clearance is not a taking for public use. We held in *Re Brewster Street Housing Site,* 291 Mich. 313, that the power of eminent domain may be employed for acquiring property for slum clearance **and low cost housing**. Since the jury found in the instant case that it was necessary to acquire the land for these public purposes, **we need not decide whether a municipality can validly condemn property where the main purpose may be better housing but slum clearance is also involved**.

Id. at 646 (some internal citations omitted; emphasis added). It is noteworthy that this Court did not determine the statute unconstitutional because it inextricably intertwined a public and private purpose, as had been done in *Berrien* four decades earlier and as this Court would do in *Shizas v City of Detroit*, 333 Mich 44 (1952) one decade later.

In *In re Slum Clearance*, 331 Mich 714 (1951) this Court upheld an action "to take private property for the public use or benefit, for the purpose of eliminating housing conditions detrimental to the public peace, health, safety, morals and welfare, and to aid in **replanning and**

reconstruction of the area involved." *Id.* at 716 (emphasis added). The property owners objected to the taking, asserting that it was

> unconstitutional because the real estate, while taken for a public use, is, after objectionable buildings are razed, to be sold for redevelopment by private persons and that, considering the purposes of the condemnation as a whole, the proposed action is improper and unconstitutional, as condemning the lands of one private person to be devoted to the uses and purposes of another private person.

Id. at 718-719. The ability to resell property obtained for slum clearance and creation of new, private housing had been specifically referenced in *In re Brewster*. The public use was once again confirmed.

In re Brewster, *In re Jeffries* and *In re Slum Clearance* have been misidentified as slum clearance cases, which ignores the fact that a dual public use existed. The second, equally important use included construction of facilities either by the City or by private developers. These facilities were not open to the public, rather, they were made available to private people. The construction of public housing was not an incidental consequence of clearing activities but was a, if not the, driving force behind the projects.

In re Brewster, *In re Jeffries* and *In re Slum Clearance* abandon the notion expressed in some of the cases of the prior century and relied upon by defendants that a public use required the construction of a facility made open to the public. Instead, this Court recognized that the means of creating a public use could include an action, namely the removal of slum conditions, and the construction of facilities used exclusively by private individuals, where allowing those private individuals to use the facilities contributed to the common good. Based upon these precedents, there is no reason to assert that the acquisition of property in *Poletown* that was used to save thousands of jobs and create other benefits did not constitute a public use. If the creation of public housing protected the welfare of the population and was therefore a public use, there is no reason

why protecting jobs that helped alleviate dire economic conditions would not be an equally valid public use.

These are the critical points to be found in *Slum Clearance*, not the notion as expressed by Justice Ryan's *Poletown* dissent that this Court only approved the incidental resale of the condemned property to private parties intent on profiting from their development. *See, e.g., Poletown, supra* at 672-673. As has been demonstrated, ownership of condemned property by a private corporation for the purpose of earning a profit has never been an impediment to condemning property in Michigan, so long as a public use existed. This Court's recognition of dual public uses is important when evaluating the criticisms of the *Poletown* and, most notably, Justice Ryan's dissent. While Justice Ryan acknowledges the first two slum clearing cases in a string cite, he only quotes from the last. *Id.* at 673-674 (Ryan, J., *dissenting*). He concludes that "[s]imply put, the object of eminent domain when used in connection with slum clearance is not to convey the land to a private corporation as it is in this case, but to erase blight, danger and disease." *Id.* That was simply not the case. The public use also involved construction of facilities for use by other private individuals in manner recognized by the legislature to benefit the community as a whole and in some instances private, profit-motivated parties constructed the facilities.

In *Shizas, supra*, this Court held that a statute authorizing the use of eminent domain to construct a parking structure with retail facilities on the ground floor was unconstitutional. The Court recognized that construction of a public parking facility was a public use. "It is not disputed that the demand for parking facilities in this section of Detroit greatly exceeds the provision made therefor under the plan of the municipal parking authority." *Id.* at 49. However, this Court concluded that the retail portion of the project was not a public use.

> The fact that the revenue derived from the contemplated stores is required to be credited to the parking facility does not mean that the property thus rented is devoted to a public use within the meaning of the general principles of law applicable to the exercise of the power of eminent domain. Neither does the fact that the legislature has seen fit to limit the amount of floor space that can be rented to 25% of the total render such nonpublic use merely an incidental one. It is significant that the act does not permit merely the leasing of space not necessary to the public service, nor is it limited to space not adapted to the public use. The power granted to the municipality, if valid, may be exercised without reference to the public requirements as to parking facilities.

Id. at 51-52. On its face, *Shizas* supports the dissent in *Poletown*. However, key distinctions must be made.

Shizas quotes from the title to PA 1947, No 286, which defines it as "[a]n act to authorize cities to acquire and operate automobile parking facilities for the use of the public; to provide the manner of acquiring and financing the same; and to authorize the leasing of space therein for **other uses**." *Shizas*, *supra* at 46. The portion of the statute itself that authorized leasing allowed such leasing to occur if the city "shall deem such leasing to be beneficial in connection with the acquirement and/or operation of such facilities." *Id.* at 47. The act enabling the acquisition defined only the parking facility as a public use and the city did not need to find that the commercial leasing was in and of itself public use as a prerequisite to implementing the project. Furthermore, *Shizas* is devoid of any facts that would indicate that the creation of retail space was necessary to the economy of Detroit, created any significant additional employment or otherwise conferred a public benefit allowing it to be classified as a public use. Contrast this lack of factual support for a public use with *Poletown*, which acknowledged the benefit of "adding jobs and taxes to the economic base of the municipality and state," *Poletown*, *supra* at 629, an economic base that the dissenters confirmed was suffering from "calamitous" unemployment and which depended upon the "foundering automobile industry." *Id.* at 647 (Ryan, J., *dissenting*).

In *Shizas*, the public and private aspects of the taking could not be separated. Therefore, the facts of that case distinguished it from prior opinions upholding projects that involved the creation of retail space that was "held to be merely incidental to the main object served." *Shizas*, *supra* at 53; *compare Shizas with Cleveland v City of Detroit*, 322 Mich 172, 178 (1948) (allowing use of eminent domain by city to acquire bus terminals that might "be used incidentally for buildings to be leased by defendant to private businesses") and *Dyer v Township of Burns*, 228 Mich 513, 514 (1924) (allowing eminent domain to obtain land for construction of "a building to be used primarily for municipal purposes... [that] incidentally... might be used for other purposes"). The public use in *Poletown* was the salvation of thousands of jobs and subsidiary economic development, not the creation of a plant for General Motors ("GM"). Like *Cleveland* and *Dyer* and unlike *Shizas*, the goal in *Poletown* was a public use and not to benefit GM, even if the projects were radically different in nature. Furthermore, the holding in *Poletown* did not lead to the implementation of projects conferring private benefits unaccompanied by a public use, as was evident by the rejection of the use of condemnation in *City of Center Line v Chmelko*, 164 Mich App 251 (1987), *City of Lansing v Edward Rose Realty, Inc.*, 442 Mich 626 (1993) and *City of Novi v Robert Adell Children's Funded Trust*, 253 Mich App 330 (2002).

Lakehead Pipe Line Co., Inc., v Dehn, 340 Mich 25 (1954)[4] represents a departure from this Court's decision in *Ryerson*, as upheld in *Berrien*. *Lakehead* upheld a circuit judge finding that construction of an oil transmission pipeline was a public use. In doing so, this Court noted that

> proofs were taken before the commissioners, from which it appeared that plaintiff intended to operate the pipe line as a common carrier of petroleum products, that negotiations with different parties in Michigan had been conducted for the delivery of oil to Michigan refineries, and that the establishment of "take-off points" for other purchasers requesting delivery in this State **was contemplated**. Testimony was

4 Both *Shizas* and *Lakehead* were authored by Justice Carr.

> offered tending to establish that the construction of the pipe line and its operation in the manner intended would result in industrial benefits to the areas concerned. Plaintiff's president testified that in addition to delivering oil to refineries and other purchasers in Michigan the company would be prepared to transport Michigan oil between points in this State, or between points herein and consignees outside of the State, **if available therefor**.

Id. at 29-30 (emphasis added).

This Court did not express reservation about the fact that the take-off points appeared to be a private service to particular oil refineries that was unavailable to the public at-large. In addition, this Court was not concerned that no market existed for the transport of oil between points in the state and was satisfied that the "duty in such respect continues even though occasion for its performance does not presently exist." *Id.* at 27. This Court's reliance upon the fact that the pipe line "would result in industrial benefits to the areas concerned," *id.* at 30, reflects the recognition that public use can entail conferring general economic benefits to the impacted area, even where no evidence of dire economic circumstances existed. Condemnation has also been used for a variety of other utility-related projects that similarly created economic benefits to the public in general, including an underground gasoline storage facility, *see Michigan Consol Gas Co v Muzeck*, 379 Mich 649, 654 (1967) ("condemnation may be used to acquire property for gas storage, for acquisition of lands in connection with hydroelectric or water power projects, and for gas pipeline rights-of-way"), a hydrolic power facility, *see Allegan v Vonasek*, 261 Mich 316 (1933) and a high-voltage electric line, *In re Petition of Detroit Edison*, 365 Mich 35, (1961).

A thorough review of over a dozen decisions issued by this Court prior to *Poletown* demonstrates that "public use" has truly been an elastic term that incorporates a wide variety of projects that benefit the general public. In 1852, the *Swan* Court gave advice that has been followed by this Court on many occasions up to and including the decision in *Poletown*:

> The power of the government respecting public improvements is a sovereign power. It rests win the wisdom of the legislature to determine when, and in what manner, the public necessities require its exercise, and **with the reasonableness of the exercise of that discretion Courts will not interfere. These necessities change with the progress of society. . . . [G]overnment must adapt itself to the existing condition and wants of society, or its efficiency is destroyed.**

Id. at 437– 438 (internal citations omitted; emphasis added;).

b. If this Court Reaches the Constitutional Issues Before It, the Doctrine of Stare Decisis Should Be Applied.

Regardless of how the majority of this Court would have decided *Poletown*, the decision was based upon extensive precedent defining public use and should be respected based upon the doctrine of stare decisis.

"Under the doctrine of stare decision, principles of the law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed." *People v Jamieson*, 436 Mich 61, 79 (1990). As stated in *Pohutski v City of Allen Park*, 465 Mich 675 (2002):

> Stare decisis is generally "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."

Id. at 693, *quoting Robinson v City of Detroit*, 462 Mich 439, 463 (2000) (*quoting Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998)).

Robinson also states that while stare decisis is "not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions," the Court should determine not only whether the case was erroneously decided, but also rather the former precedent "decisions are unworkable or are badly reasoned." *Id.* at 463-464, *citing Holder v Hall*, 512 US 874, 944; 114 S Ct 2581; 129 L Ed 2d 687 (1994). Stare decisis is important because it "establishes uniformity,

certainty, and stability in the law," and it is the "rare case when it is clearly apparent that an error has been made [] or when changing conditions result in injustice by the application of an outmoded rule," that the Court will deviate from established precedent. *See Brown v Manistee Rd Comm*, 452 Mich 354, 366 (1996) (internal quotations and citations omitted). As best said in the opinion of Justice Kelly in *Robinson*:

> The overruling of one of this Court's precedents ought to be a matter of great moment and consequence. Although the doctrine of stare decision is not an "inexorable command," **this Court has repeatedly stressed that fidelity to precedent is fundamental to "a society governed by the rule of law. . . .**
>
> **Consequently, this Court has never departed from precedent without "special justification." Such justifications include the advent of "subsequent changes or development in the law that undermine a decision's rationale, the need "to bring [a decision] into agreement with experience and with facts newly ascertained," and a showing that a particular precedent has become a "detriment to coherence and consistency in the law."**

Id. at 476-477 (Kelly, J., *concurring in part and dissenting in part*) (internal citations omitted; emphasis added).

Similarly, as then Justice Corrigan stated in *Robinson*, "[s]ubsequent events and further reflection frequently reveal errors in the reasoning of an opinion or unforeseen consequences" and in those circumstances, the Court has a "responsibility [to] reconsider the prior decision." *Id.* at 471 (Corrigan, J., *concurring*) (citations omitted). Here, subsequent events including the application of the *Poletown* decision by the Court of Appeals do not suggest *Poletown* was decided in error nor should further reflection. Rather, as discussed *supra*, a review of the cases relied on in *Poletown* establishes that it is a mere extension of previous precedent which common law requires the Court to do when conditions dictate. *See Robinson*, *supra* at 471, n2 (Corrigan, J., *concurring*).

It cannot be said that *Poletown* was badly reasoned as the majority consistently applied long-standing public use precedent. Thus, while the *Poletown* dissent argues that the majority decision

in *Poletown* was a radical shift in eminent domain law, a plain and complete reading of *Poletown* and the public use cases preceding it establishes that *Poletown* was merely a logical, rational evolution of eminent domain doctrine. As such, even if the majority of this Court would have ruled differently, stare decisis should apply.

III. WHERE EMINENT DOMAIN HAS BEEN USED TO CONDEMN PROPERTY ULTIMATELY OWNED BY PRIVATE INTERESTS, THAT RIGHT HAS BEEN EXPRESSLY PROVIDED BY STATUTE AND BECAUSE NO SUCH STATUTORY AUTHORITY EXISTS FOR THIS PROJECT, MCL 213.23 IS NOT A SUFFICIENT GRANT OF AUTHORITY TO THE COUNTY.

As has been established, this Court has never denied the existence of a public use solely because the project required ownership of the condemned property by private, profit-driven interests so long as a public use existed. However, in each of those cases, an independent statutory authority existed that authorized either the direct acquisition of the property by the private agency or conveyance to a private entity by a public agency. While ICSC concurs in the plaintiff's argument that MCLA 213.23 generally enables it to exercise the power of eminent domain, MCLA 213.23 is limited to projects that do not require transfer of ownership of that property to a private entity (such as a road, bridge, drain, utility line, park or a housing facility owned by the public). Therefore, plaintiff cannot use MCLA 213.23 for the Pinnacle Project. The Pinnacle Project exists to convey the condemned property, at least in large part, to private entities. However, because plaintiff has not relied upon an enabling act that authorizes it to convey that acquired property, MCLA 212.23 is not a sufficient grant of power for this particular project. Plaintiff has failed to identify any statute, much less a statute found **within the enabling act** upon which it relies to convey the condemned property in order to complete the project.

All of the cases that authorize the use of eminent domain for projects that involve ultimate use of the acquired property by private entities identify the statutory basis for the ultimate transfer of

the property. In *Poletown*, the City of Detroit "use[d] the power of eminent domain granted to it by the Economic Development Corporations Act, MCL 125.1601 et seq." *Poletown, supra* at 629. Per MCLA 215.1607:[5]

> (1) In order to accomplish the public purposes set forth in section 2 the corporation may:...
>
> (e) Enter into leases, lease purchase agreements, installment sales contracts or loan agreements with any person, firm, or corporation for the use or sale of the project.
>
> (f) Mortgage or create security interests in the project, a part of the project, a lease or loan, or the rents, revenues, or sums to be paid during the term of a lease or loan, in favor of holders of bonds or notes issued by the corporation.
>
> (g) Sell and convey the project or any part of the project for a price and at a time as the corporation determines.

Therefore, the very act that authorized the use of eminent domain also authorized the sale of the acquired property. Similarly, as discussed *supra*, *In re Brewster* specifically quoted from the section of the act authorizing the City to "sell, exchange, transfer, assign and mortgage any property." *In re Brewster*, *supra* at 324. Specific statutes have been implemented enabling private agencies to utilize eminent domain. See MCL 331.9 (hospital authority); MCL 462.241 (railroad, bridge or tunnel company); and MCL 486.252 (electrical and gas corporations).

However, plaintiff has not cited any specific authority to convey property that it acquires through eminent domain. Rather, the County relies upon MCLA 213.23:

> Any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose. When funds have been appropriated by the legislature to a state agency or division thereof or the office of

[5] MCLA 125.1607 was amended by PA1980, No 501 § 1, and it is unclear which version of the statute was used by the City. However, according to the Historical and Statutory Notes, it does not appear that the amendments substantially altered the powers granted.

> the governor or a division thereof for the purpose of acquiring lands or property for a designated public purpose, such unit to which the appropriation has been made is authorized on behalf of the people of the state of Michigan to acquire the lands or property either by purchase, condemnation or otherwise. For the purpose of condemnation the unit may proceed under the provisions of this act.

This statute does not confer the authority to sell property acquired through eminent domain. Neither do the other remnants of the Acquisition of Property by State Agencies and Public Corporations, MCLA 213.21-25, which survived the enactment of the UCPA.

The UCPA does not authorize the sale of condemned property in the manner required by the Pinnacle Project. MCLA 213.72 does convey a limited ability to lease or sell property: "[i]f property is acquired by an agency, the agency may lease, sell, or convey any portion **not needed**, on whatever terms the agency considers proper." (Emphasis supplied) However, the key to this statute is that the property that the agency wishes to sell is "not needed" for the project. As such, it is clearly a reference to acquired remnant parcels. *See* MCLA 213.54(1). The plain language of MCLA 213.72 cannot be stretched to include the wholesale transfer of the majority of the property in the project in order to allow private entities to construct the improvements that created the public use in the first place.

Furthermore, if the authority to both condemn and convey to private interests was inherent to public agencies, then the legislature unnecessarily enacted statutes specifically granting both powers in acts that declare projects involving economic redevelopment to be public uses. *See,* Economic Development Corporations Act, MCLA 213.1601 et seq.; Downtown Development Authority Act,[6] MCLA 125.1636 *et seq.*; Blighted Area Rehabilitation Act,[7] MCL 125.71 *et seq.*; and Urban

[6] MCLA 125.1657(h) authorizes conveyance of property and MCLA 125.1660 authorizes the municipality to use eminent domain to acquire property to transfer to the authority.

[7] MCLA 125.75 authorizes acquisition by eminent domain and MCLA 125.76 authorizes conveyance to private owners to develop.

Redevelopment Corporations Act,[8] MCL 125.1651 *et seq*. Presumably, plaintiff used a general condemnation statute in order to avoid the strict requirements found in the acts referenced.

The Economic Development Corporations Act requires the creation of a project citizens district council of at least nine citizens representative of the project including residents and business owners, *see* MCL 125.1612, period consultations with the project citizens district council, *see* MCL 125.1614, creation of a specific project plan, *see* MCL 125.1608-125.1610, and a public hearing to discuss the plan, *see* MCL 125.1617. The project plan must contain, among other things, a description of the improvements to be constructed, zoning changes implemented and lists of persons to whom property will be leased, sold or conveyed.

The Downtown Development Authority Act also contains strict requirements designed to insure that the process that may ultimately lead to the use of eminent domain is open to the public. A public hearing must occur before a municipality establishes an authority, *see* MCL 125.1653, a governing board including "a majority of members having an interest in property located" in the district and regular meetings held in "compliance with the open meetings act," *see* MCL 125.1654, and the corporation must prepare a development plan prior to the financing of any project that includes additional, specific requirements.

Both the Blighted Area Rehabilitation Act and the Urban Redevelopment Corporations Act contain substantially similar provisions. These provisions exist to require public participation in the creation of specific plans as a prerequisite to implementation of a project and the determination that eminent domain will be used. Under these acts, eminent domain cannot be used until the public agency actually knows what it will do with the acquired property. Holding that an enabling act that

[8] MCLA 125.916(2) authorizes the city to acquire property by eminent domain for the benefit of the redevelopment corporation and MCLA 125.907(3) allows conveyance following approval by the municipality.

does not contain a corollary provision allowing conveyance of property needed to implement the project is insufficient to authorize a taking that necessarily involves transfer of condemned property to private entities will force public agencies to exercise its rights under an act that contains reciprocal responsibilities. This Court should hold that plaintiff cannot pursue the Pinnacle Project condemnations under MCL 213.23.

Finally, because this Court can overrule the opinion of the lower courts on statutory grounds without reaching a constitutional issue, in accord with past precedent, this Court should decline the activist's temptation to consider the continued vitality of *Poletown*. "[W]e decline to address the due process argument raised by Wayne County and Ecorse. There exists a general presumption that constitutional issues that are not necessary to resolve a case will not be reached." *Great Lakes Div. of Nat'l Steel Corp v City of Ecorse,* 227 Mich App 379, 432 (1998), *citing Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234 (1993); *see also People v Mezy*, 453 Mich 269, 287 (1996) (Brickley, J., *concurring in part and dissenting in part*) ("Whether or not the members of this Court feel that the case was wrongly decided, principles of stare decisis require its continued vitality until and unless review is required for the resolution of the case before us. The instant cases may be decided on statutory grounds, making it unnecessary to reach the constitutional question of double jeopardy that invites review of [*People v Cooper*, 398 Mich 450 (1976)].")

CONCLUSION

Because the County implemented the Pinnacle Project utilizing an insufficient statutory basis, this Court should overrule the lower court decisions without reaching beyond that statutory issue. In the event that this Court disagrees with ICSC's and the defendants' statutory arguments, the Court should allow *Poletown* to stand because private ownership of property acquired through eminent domain has never foreclosed the determination that a public use existed, decisions of this Court fully support the proposition that public use is a flexible doctrine encompassing the statutory authorization of the acquisition of the property at issue in *Poletown*, and the doctrine of stare decisis should be respected.

WHEREFORE, *Amicus Curiae* ICSC respectfully requests that this Court overrule the lower courts on a statutory basis, thereby avoiding the necessity of addressing *Poletown* or, alternatively, hold that *Poletown* remains valid precedent based upon the public use opinions of this Court that preceded it.

Respectfully submitted,

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